

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CHRISTOPHER B LOONEY,  
  
Petitioner,

v.

MAGGIE MILLER-STOUT.  
  
Respondent.

CASE NO. C09-5238 RBL-JRC  
  
ORDER DENYING PETITIONER'S  
MOTION FOR APPOINTMENT OF  
COUNSEL AND AN EVIDENTIARY  
HEARING

The District Court referred this petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 to United States Magistrate Judge J. Richard Creatura. The referral is made pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), and local Magistrate Judge Rules MJR3 and MJR4.

Petitioner filed a motion for an evidentiary hearing after he had filed a reply to respondent's answer (Dkt. 51). Petitioner included a motion for appointment of counsel in his motion for an evidentiary hearing (*id.*). The Court denies petitioner's motions.

1       A.       Evidentiary hearing.

2       Evidentiary hearings are not usually necessary in a habeas case. According to 28  
3 U.S.C. §2254(e)(2), a hearing will only occur if a habeas applicant has failed to develop the  
4 factual basis for a claim in state court, and the applicant shows that: (A) the claim relies on (1)  
5 a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme  
6 Court that was previously unavailable, or if there is (2) a factual predicate that could not have  
7 been previously discovered through the exercise of due diligence; and (B) the facts underlying  
8 the claim would be sufficient to establish by clear and convincing evidence that but for  
9 constitutional error, no reasonable fact finder would have found the applicant guilty of the  
10 underlying offense. 28 U.S.C. §2254(e)(2).

11       Here, the record has been fully developed in state court. Petitioner waived any argument  
12 he had regarding failure to provide discovery by knowingly going forward with his guilty plea  
13 after counsel asked if he wanted a one week extension of time so that they could obtain two  
14 missing pages of transcripts (Dkt. 42, Exhibit 7, p. 3, Washington State Court of Appeals  
15 decision on direct review); (Dkt. 42, Exhibit 9, Attachment 9, Findings of Fact 21-23,  
16 Washington State Superior Court's findings of fact on defendant's motion to withdraw his guilty  
17 plea); (Dkt. 42, Exhibit 11, pp. 2-3, Washington State Court of Appeals decision dismissing  
18 petitioner's first personal restraint petition). Petitioner knew the factual predicate for this claim  
19 prior to entering his guilty plea. Further, petitioner fails to show that the facts underlying the  
20 claim would be sufficient to establish by clear and convincing evidence that but for constitutional  
21 error no reasonable fact finder would have found the applicant guilty of the underlying offense.  
22 Accordingly, the Court denies Petitioner's motion for an evidentiary hearing.

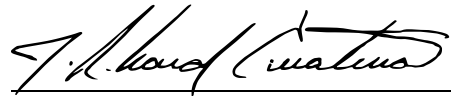
23 //

B. Appointment of counsel.

There is no right to have counsel appointed in cases brought under 28 U.S.C. § 2254 unless an evidentiary hearing is required, because the action is civil, not criminal, in nature. *Brown v. Vasquez*, 952 F.2d 1164, 1168 (9th Cir. 1991) (citing *McCleskey v. Zant*, 499 U.S. 467, 495 (1991)); see *Ortiz v. Stewart*, 149 F.3d 923, 939 (9th Cir. 1998) (“There is simply no constitutional right to an attorney in a state post-conviction proceeding.”); see also *Terrovona v. Kincheloe*, 852 F.2d 424, 429 (9th Cir. 1988).

Petitioner fails to show an evidentiary hearing is appropriate in this case. Accordingly, The Court denies petitioner’s motion for appointment of counsel.

Dated this 25<sup>th</sup> day of February, 2015.



J. Richard Creatura  
United States Magistrate Judge